Testimony of Mark D. Rosen
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on the Subject of Congressional Power to Enact H.R. 1755,
the "Child Custody Protection Act,"
before the Committee on the Judiciary Constitution Subcommittee.
Congressman Steve Chabot, Subcommittee Chair
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The Subcommittee has asked that I testify concerning Congress' power to enact H.R. 1755, the Child Custody Protection Act. I teach and write in the fields of constitutional law, choice-of-law, and state and local government law. Federalism is one of my principal interests.

The proposed legislation would make it a federal crime to knowingly transport "a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridge[] the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides . . ." I believe that Congress has authority to enact this law under the Commerce Clause and the Full Faith and Credit Clause. In my view, H.R. 1755 is fully consistent with principles of federalism, and is not inconsistent with the right to travel or constitutional limitations connected to abortion rights. My testimony should not be construed as an argument in favor of the enactment of the Child Custody Protection Act. I only hope to establish that Congress is not constitutionally foreclosed from enacting such legislation, and that deciding whether to enact it accordingly is a political decision.

I. THE COMMERCE CLAUSE

Congress has the power to enact H.R. 1755 under its Commerce Clause powers.[1] H.R. 1755 is a regulation of commerce among the several States. "The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution . . ."[2] The power to regulate the transport of passengers is derived from Congress' powers over the "channels of interstate commerce,"[3] and recent Supreme Court case law continues to hold that "Congress may regulate the use of the channels of interstate commerce."[4] Because transportation itself qualifies as interstate commerce, it is not necessary to consider whether H.R. 1755 regulates "activities having a substantial relation to interstate commerce,"[5] that is to say, activities that themselves are not commerce but that "substantially affect interstate commerce."[6]

It is well established that Congress can adopt rules concerning interstate commerce, such as H.R. 1755, even if Congress is primarily motivated by non-economic goals.[7] The Court recently has warned that Congress cannot "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," and has referred to the "family law context" as an area of "traditional state regulation."[8] H.R. 1755 would not run afoul of such commerce clause limitations because the proposed legislation supports rather than obliterates state and local authority by seeking to counter the circumvention of a class of state laws. In relation to the Court's concern that Congress not "completely obliterate the Constitution's distinction between national and local authority,"[9] it is critical that H.R. 1755 operates not by creating a substantive rule regarding family law but by sorting out a choice-of-law problem by indicating which state's substantive law is to govern under a certain context.[10] Determining the appropriate scope of a state's family law does not obliterate the distinction between what is national and local. To the contrary, sorting out the scope of states' competing regulatory efforts is a perfectly appropriate function for the federal government to serve

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[1]The analysis that follows in this first section of my testimony is in substantial agreement with the testimony of Professor John C. Harrison, which was provided to this Subcommittee in respect of H.R. 1755's predecessor of H.R. 1218. See Statement of John C. Harrison, Professor of Law, University of Virginia, H.R. Rep. No. 106-204 (June 25, 1999).

[2]Caminetti v. United States, 242 U.S. 470, 491 (1917).

[3]Id.

[4]United States v. Lopez, 514 U.S. 549, 558 (1995).

[5]Id. at 558-59.

[6]Id. It is with respect to this category of regulations that the Supreme Court has limited congressional power in successive cases. See Lopez, 514 U.S. at 567-68; United States v. Morrison, 529 U.S. 598, 617-18 (2000).

[7]See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding enactment of Title II of the Civil Rights Act under Congress' commerce clause power); see also Caminetti, 242 U.S. at 491 (it is "within the regulatory power of Congress, under the commerce clause of the Constitution . . . to keep the channels of interstate commerce free from immoral and injurious uses . . .").

[8]Morrison, 529 U.S. at 615-18. The Morrison Court discussed these limitations with regard to an analysis of congressional power to regulate matters that themselves are not commerce but that "substantially affect interstate commerce." It is possible that these limitations would not be applied at all to regulations of interstate commerce itself, such as H.R. 1755.

[9]Morrison, 529 U.S. at 615.

[10]Determining which of two competing states' laws is to apply necessarily means that one state's law will be deemed inapplicable, but resolving choice-of-law problems is fundamentally different from displacing state law with a substantive federal rule. To illustrate, a substantive federal rule would govern all scenarios within a given state. A choice-of-law rule such as H.R. 1755 does not displace the visited state's law, which does not require parental notification, but only indicates a class of persons to whom that law may not be applied.

that helps to govern the relationships among states, thereby securing the "horizontal federalism" component of our federal system. The next section more fully elaborates these points concerning the proposed legislation's choice-of-law character.

II. THE "EFFECTS CLAUSE" OF THE FULL FAITH AND CREDIT CLAUSE

Wholly independent of the Commerce Clause, Congress has the power to enact H.R. 1755 under the Effects Clause, which is part of the Full Faith and Credit Clause.[11] A clear understanding of the type of issue that H.R. 1755 addresses facilitates recognition why it falls within Congress' powers under the Effects Clause. The general question H.R. 1755 addresses is whether a person Z who resides in State A remains subject to a particular State A law when she is in State B. The determination of which of several states' law applies to a particular person, transaction, or occurrence is made by what is known as "choice-of-law" doctrines. At its core, H.R. 1755 is a federal choice-of-law rule. It determines which law governs a minor from a parental notification state who is visiting a state without such a requirement.

Under contemporary law, virtually all choice-of-law doctrines are a matter of state law. For almost a century, however, it has been vigorously argued by many legal scholars that choice-of-law is more appropriately a matter of federal law.[12] This conclusion is sensible because choice-of-law regulates the regulatory reach of each state, and it is unwise to leave resolution of this question to the states themselves; allowing each state to answer the question is akin to asking the fox to guard the proverbial henhouse. Quite apart from the normative question of whether choice-of-law should be federal law, virtually all legal scholars are of the view that Congress has authority under the so-called "Effects Clause" of the Full Faith and Credit Clause to enact choice-of-law rules.[13] That provision grants Congress the power to enact "general Laws" that "prescribe . . . the effect" that one state's laws shall have in other States.[14] Indeed, the Supreme Court on several occasions has observed in dicta that Congress has the power to enact choice of law rules under the Effects Clause.[15]

Congress is authorized to enact a choice-of-law rule such as H.R. 1755 under the Effects clause. Dictum in a plurality opinion has stated that "there is at least some question whether

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[11] See U.S. CONST. ART. IV, §1.

[12] See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 301 (1992); Michael Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Walter Wheeler Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L. J. 421, 425-26 (1919).

[13] See U.S. CONST. ART. IV, §1, CL. 2 and sources cited above at footnote 12.

[14] The Full Faith and Credit's term "public Acts" long has been understood to refer to legislation.

[15] For example, in Sun Oil v. Wortman, 486 U.S. 717 (1986), the Court decided that a forum state that was constitutionally obligated to apply non-forum law nonetheless could apply the forum state's statute of limitations. The Court rejected the modern view that statute of limitations are substantive, which would have led to the conclusion that the non-forum's statute-of-limitations had to be applied, and instead held that the historical understanding that statute of limitations are procedural governed for purposes of the Full Faith and Credit Clause. Id. at 728-29. The Court nonetheless went on to state that "[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes . . . it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause." Id. at 729.

Congress may cut back on the measure of faith and credit required by a decision of this Court."[16] H.R. 1755 is not inconsistent with this dictum[17] because the Supreme Court does not currently interpret the Full Faith and Credit Clause as dictating which substantive law one state must apply. Contemporary full faith and credit case law permits a state to apply its law if there is a "significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[18] The Court's full faith and credit rule would permit the minor's state of residence to apply its law to the minor's activity in a sister state on account of the state of residence's continuing interests in protecting the parent's rights to "consult with [their daughter] in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family."[19] The proposed legislation hence does not contradict the case law, but specifies which state's law applies in a circumstance where Supreme Court case law has left the question unanswered.[20]

H.R. 1755 does not appear to exceed Congress's powers under the Effects Clause in any other respects. Although H.R. 1755 provides a choice-of-law rule only with regard to parental notification requirements, the Effects Clause's language authorizing the enactment of "general Laws" has not prevented Congress from enacting subject-specific legislation in the past under the Effects Clause.[21] Indeed, there are strong reasons to believe that intelligent choice-of-law rules must be context-specific rather than trans-substantive, and that construing "general Laws" so as to disallow Congress from making subject-matter sensitive choice of law rules would jeopardize Congress' ability to create

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[16]448 U.S. 261, 272 n. 18 (1980) (plurality). The plurality opinion's comments are dictum because the Thomas case did not analyze the scope of a congressional enactment under the Effects clause, but instead concerned the question of whether one state must give *res judicata* effect to a workmen's compensation claim that had been issued by another state's administrative agency. Id. at 286. The plurality opinion in Thomas also opined that "Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State . . ." Id.

[17]This is not to suggest that I believe that Congress would be without the authority to do so, but only that H.R. 1755 does not raise the difficult question of whether Congress has authority under the Effects Clause to specify different full faith and credit rules than the Supreme Court has. See infra note 20.

[18]Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985) (internal quotation omitted).

[19]Planned Parenthood v. Casey, 505 U.S. 833, 899-900 (1992).

[20]The Supreme Court has recognized that its full faith and credit test allows more than one state's law to apply to a given person, transaction, or occurrence Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988).

I recognize that it could be argued that H.R. 1755 dilutes "the measure of faith and credit required by a decision of this Court," Thomas, 448 U.S. at 272 n. 18, insofar as it could be argued that the visited state could apply its law under the Court's jurisprudence and H.R. 1755 in effect says that it cannot. There are two responses to this claim. First, case law that permits the application of two or more states' laws does not qualify as determining "the measure of faith and credit *required* by a decision of this Court." Id. at 272 n. 18 (emphasis supplied). Rather, the case law leaves undecided the question of what measure of full faith is required of another state's law. Second, it is conceptually incoherent to suggest that Congress lacks the power under the Effects Clause to "dilute" the effect of a state's law or judgment because determining that one state's law or judgment is to be given effect is to simultaneously decide that a sister state's law or judgment is *not* to be given effect and thereby dilutes the effect of that second state's law or judgment. Professor (now Judge) Michael McConnell has advanced this argument, see Hearing on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. 57-58 (1996), and I believe it to be incontrovertible. If a dilution limitation as applied to the Effects Clause truly is incoherent, then the plurality's dictum in the Thomas case should be resisted.

[21]See Parental Kidnaping Prevent act of 1980, 28 U.S.C. §1738A; Full Faith and Credit for Child Support Orders Act of 1994, 28 U.S.C. §1738B; Violence Against Women Act's full faith and credit provision, 18 U.S.C. §2265 (requiring sister States to recognize and enforce a valid protection order issued by another state).

efficacious choice-of-law rules.[22] Because Congress has passed legislation pursuant to the Effects Clause only a handful of times, the Supreme Court has not had the opportunity to significantly develop the contours of Congress's Effects Clause powers. Although this means that analysis of Congress's powers under the Clause necessarily is speculative, such uncertainty is not a reason for Congress to avoid relying on the Effects Clause; after all, in view of Article III's "case or controversy" requirements, it is only by invocation of the Clause and subsequent judicial challenges that the scope of congressional power can ever be worked out. With all this in mind, a plausible limitation is that the Effects Clause not be used by Congress willy nilly to champion those substantive policies that it favors.[23] A feasible judicial check to ensure that Congress does not abuse its Effects Clause powers in this regard is to require that Congress' choice-of-law rule be reasonably consistent with general choice-of-law principles.[24] H.R. 1755 readily would pass such a test because the conclusion that the law of the minor's residence should govern is consistent with contemporary choice-of-law doctrines.[25] That is to say, a congressional determination that the minor should be governed by her home state's law is reasonable.

The proposed legislation does not simply specify the effect of one state's law, but also creates

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[22]Under all variants of modern interest analysis, choice-of-law is not conceptualized as a distinct body of "procedural" law but instead is largely a function of substantive law. The common ground of interest analysis is the effort to ascertain whether each of the multiple jurisdictions whose law potentially applies in fact has a governmental interest in applying its law to the facts at hand; if only one polity has an interest then there is a "false conflict" and only that jurisdiction's law is to be applied. See DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 132-33 (West Group 2001). The determination of whether there is a "false conflict" is made by considering the purpose of each state's substantive law, and asking whether the legislature would have wished to regulate the party, transaction, or occurrence. The process of deciding whether there is a false conflict hence involves ascertaining the scope of substantive law of each potentially interested jurisdiction. If this approach of first eliminating "false" conflicts indeed is a genuine contribution of modern approaches to conflicts analysis, then it would follow that efficacious choice-of-law doctrines invariably will be a tied to substantive law. If Congress is to have power under the Effects Clause to make efficacious choice-of-law doctrines, then the Effects Clause must include the power to tailor rules in a manner that is sensitive to the substantive law.

[23]The reason for this limitation is as follows. The Full Faith and Credit Clause seeks to accomplish the two somewhat mutually inconsistent goal of bringing about a federal union of meaningfully empowered States. See Baker v. General Motors Corp., 522 U.S. 222 (1998) (discussing the goal of creating a federal union); Pacific Employers Ins. Co. v. Indus. Accident Commission, 306 U.S. 493, 502 (1939) (noting Full Faith and Credit's protection of each state's sovereign interests). Congress appropriately has broad latitude when legislating pursuant to the Effects Clause to decide how to harmonize these competing policies. There is no indication, however, the Full Faith and Credit Clause is an appropriate vehicle for Congress to foist its policy preferences upon the States.

[24]Such deferential review would be similar to the approach the Court once took to reviewing congressional enactments pursuant to Section 5 of the Fourteenth Amendment. See Katzenbach v. Morgan, 384 U.S. 641, 652-57 (1966). Although the Court no longer utilizes such deferential review in relation to Congress' Section 5 powers, see City of Boerne v. Flores, 521 U.S. 507 (1997), the more explicit grant of independent congressional authority under the Effects Clause could well lead the Court to utilize more deferential review in analyzing legislation enacted pursuant to the Full Faith and Credit Clause.

[25]Under classic interest analysis, the choice between the law of the minor's residence and the law of the visiting state might be characterized as a "false conflict" – it would be said that the visiting state has no interest in regulating non-citizens, whereas the state of residence has a strong interest in regulating its citizen's conduct – with the result that the home state's parental notification law would be applied. Alternatively, the situation might be analyzed as a "true conflict," in which case the home state's law still might be selected, depending upon the type of interest analysis that were used. Under the approach advocated by Brainerd Currie, for instance, the home state's law would be selected if the parents sued in a court located in their state of residence. Under the Second Restatement of Conflict's approach, a court could well conclude that the minor's home state is the state with the most significant relationship to the matter and hence the state whose law ought to apply. Even under traditional approaches, the parental notification law might be construed as a family law that accordingly is provided by the state of residence.

civil and criminal penalties for those who transport a minor across a state border for the purpose of evading her home state's parental notification law. The question is whether the power to "prescribe . . . the effect" of the home state's parental notification law includes the power to create such civil and criminal penalties for those who facilitate the law's circumvention. While we are without guidance from the Supreme Court in answering this specific question, there are good reasons to believe that the answer is yes. Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers it has been granted.[26] If the "end be legitimate" then "all means which are appropriate, which are plainly adapted to that end" are constitutional.[27] As shown above, the end of specifying the effect of the home state's parental notification law is "legitimate." The question then becomes whether H.R. 1755's civil and criminal penalties are "appropriate" and "plainly adapted to that end." The Supreme Court has been famously deferential to congressional judgments about what means are appropriate to accomplishing legitimate ends,[28] and it seems plausible that measures of the sort found in H.R. 1755 are "useful"[29] for ensuring that the home state's parental notification laws will be given effect when the minor visits other states. Given the dynamics of family relations, there are good reasons to believe that there would be systematic evasion of parental notification laws if parents' only legal recourse were a lawsuit against their minor daughters who violated the parents' rights by crossing a border to obtain an abortion.

III. CRITICAL EXAMINATION OF POSSIBLE CONSTITUTIONAL OBJECTIONS TO H.R. 1755

A. *H.R. 1755 and Extraterritoriality*

Some opponents of H.R. 1755 have argued that the proposed legislation would give unconstitutional extraterritorial authority to the resident state's law. There are three fatal flaws to any such criticism. First, H.R. 1755 can be conceptualized as a federal law extension to state law that functions to increase the state law's efficacy. So understood, H.R. 1755 does not extend the operation of state law extraterritorially, but simply is federal law that operates across state borders, as federal law often does.

Second, the criticism that H.R. 1755 unlawfully extends state laws is based on the misconception that one state's regulatory authority ends at its borders. An early approach to choice-of-law believed that territorial location alone answered the question of what law applies, but this has been almost universally rejected in this country.[30] Today, state laws regularly apply to persons, transactions, and occurrences that occur outside the state's borders.[31] Thus scholarly restatements of the law and the Model Penal Code both understand that states may regulate their citizens out-of-state activities, and may even criminalize out-of-state activity that is permissible in the state where

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[26]U.S. CONST. ART. I., §8, CL. 18.

[27]See McCulloch v. State of Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[28]See, e.g., Jinks v. Richland County, S.C., 123 S.Ct. 1667, 1671 (2003).

[29]McCulloch, 17 U.S. at 413; see also id. at 419.

[30]See CURRIE, ET. AL., supra note 22, at 2-6.

[31]For a comprehensive examination of states' powers to regulate their citizens' out-of-state activities, see Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002).

it occurs.[32]

Third, even if states lacked the power to regulate their citizens' out-of-state activities under contemporary law, the Effects Clause and the Commerce Clause both can serve to extend states' regulatory powers. The Effects Clause gives Congress the power to alter the extraterritorial effect that one state's public acts, records and judicial proceedings have in other states. Thus before Congress enacted the Violence Against Women Act's full faith and credit provision, it was uncertain whether a protective order issued in State A would have effect in State B, whose laws differed from State A such that no protective order would be issued on the facts.[33] The federal act provided that State B was required to give effect to State A's protective order.[34] Similarly, while states on their own may not enact protectionist legislation that disallows goods from other states to cross their borders,[35] the Commerce Clause allows Congress to grant states such powers to discriminate against goods from other states.[36] As a structural matter, a federal government that umpires the sister states' regulatory powers vis-a-vis one another is eminently sensible, and several constitutional provisions – including the Effects Clause and the Commerce Clause – empower Congress to serve this function.

B. *Federalism and the Right to Travel*

Some opponents of H.R. 1755 have argued that the Child Custody Prevention Act would be inconsistent with constitutional principles of federalism. To the contrary, I believe that H.R. 1755 is consistent with a more attractive conception of federalism than these opponents implicitly adopt.

States may have divergent substantive policies with respect to those matters that are not violative of the United States Constitution or displaced by federal law. Such diversity among states is one of the frequently heralded benefits of our federal system. Many constitutionally legitimate state laws, however, can be frustrated if citizens can free themselves of their home state's legal requirements merely by crossing a state border and availing themselves of their neighboring state's

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[32]The Restatement (Third) of Foreign Relations Law provides that states "may apply at least some laws to a person outside [State] territory on the basis that he is a citizen, resident or domiciliary of the State." Restatement (Third) of Foreign Relations Law §402 reporters' notes at 5 (1986). The Restatement asserts that this principle applies to both extraterritorial criminal and civil legislative powers. See id. at §403, comment f. The Reporters Notes make clear that the Restatement understands that its principles apply to the extraterritorial powers enjoyed by states within the United States. See id. at §402 and Reporters' Notes 5.

Directed to the criminal context, the Model Penal Code provides that State A may impose liability if "the offense is based on a statute of this state that expressly prohibits conduct outside the state." Model Penal Code §1.03(1)(f). The Model Penal Code provides that State A has extraterritorial legislative jurisdiction even if the activity it prohibits occurs in a State in which the activity is permissible. Id. The major limitation identified by the Model Penal Code is that the regulated conduct must "bear[] a reasonable relation to a legitimate interest of [the regulating] state." Id. at § 1.03(2). The Comment states that the "reasonable relation to legitimate interests" requirement "expresses the general principle of the fourteenth amendment limitation on state legislative jurisdiction." Id. at §1.03(1)(f).

[33]See Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004).

[34]See 18 U.S.C. §2265 (2000).

[35]See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[36]See, e.g., New York v. United States, 505 U.S. 144, 171 (1992) ("While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, that limitation may be lifted, as it has been here, by an expression of the 'unambiguous intent' of Congress.") (internal citations omitted).

varying law. This is true of constitutionally permissible state laws that are paternalistic or that seek to protect third-party interests. By undermining the efficacy of such state laws, "travel-evasion" in effect thwarts the diversity of state laws that is theoretically permissible under our federal system.[37] A law such as H.R. 1755 supports diversity across states by ensuring that each state can pursue efficacious policies in those realms that are not foreclosed by the Constitution or other federal law. It is my view that the diversity that federalism can afford is an affirmative good in a country as large and diverse as ours.

Those who assert federalism challenges to H.R. 1755 are working with a different conception of federalism. They evidently are of the view that although diversity across states is good, citizens should be able to pick and choose the laws that are to govern them by traveling to whatever jurisdiction's law they wish to govern them on an issue-by-issue basis. Indeed, some opponents of H.R. 1755 have argued that H.R. 1755 interferes with minors' constitutional "right to travel." At least one noted scholar has advocated this type of position.[38]

To begin, the notion that H.R. 1755 is inconsistent with the constitutional right to travel is not supportable under the Supreme Court's jurisprudence. Neither a state nor the federal government can interfere with a citizens' ability to leave a state for the purpose of visiting another State or prevent its citizens from returning; either would violate "the right of a citizen of one State to enter and to leave another State."[39] H.R. 1755 does not even implicate this limitation, for it does not preclude the minor from traveling, and indeed explicitly provides that a "minor transported in violation of this section . . . may not be prosecuted or sued for a violation of this section."[40] The minor's right to travel to another state is wholly unimpeded by H.R. 1755.

Even if H.R. 1755's limitation on the transportation of minors were deemed to implicate the minor's ability to enter and leave another State, it is unlikely that this would be deemed by the Court to violate her right to travel. The Court has recognized that the right to interstate travel "may be regulated or controlled by the exercise of a State's police power" and by the federal government as well.[41] This is perfectly consistent with the nature of most constitutional rights, which virtually never establish categorical prohibitions on regulation but instead heighten the requirements that must be satisfied for regulation to be constitutional.[42] Particularly relevant for present purposes, the Court has ruled that other components of the constitutional right to travel establish non-categorical rights. For instance, what the Court has identified as the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State,"[43] an aspect of the right to travel that the Court has tied to Article IV's Privileges and Immunities Clause, does not establish an "absolute"

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[37]See Rosen, supra note 31, at 856-861.

[38]Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 915 (1993).

[39]See Saenz v. Roe, 526 U.S. 489, 500 (1999).

[40]See Sec. 2431(b)(2).

[41]United States v. Guest, 86 S. Ct. 1170, 1179 & n. 17 (1965).

[42]For example, notwithstanding the First Amendment's categorical statement that "Congress shall make no law . . . abridging the freedom of speech," Congress is constitutionally permitted to regulate speech, even political speech. See, e.g., McConnell v. Federal Election Commission, 124 S. Ct. 619, 660-61 (2003); see generally Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

[43]See Saenz, 526 U.S. at 500.

right for a visitor to be treated as citizens are.[44] Rather, states are permitted to distinguish between residents and nonresidents if "there is a substantial reason for the difference in treatment" and the "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[45] If the Court were to utilize a similar test to determine whether a regulation impermissibly interfered with "the right of a citizen of one State to enter and to leave another State,"[46] the questions would be whether Congress has a substantial reason to proscribe the out-of-state transport of minors for the purpose of circumventing the home state's parental notification requirements and whether the imposition of civil and criminal penalties for such transportation bears a substantial relationship to Congress' objective. I believe that the answer to both questions vis-a-vis H.R. 1755 would be yes: Congress has a substantial reason to ensure that constitutional state policies are not undermined through travel-evasion, and, given the nature of family dynamics, civil and criminal penalties on those who facilitate the transportation of minors bear a substantial relationship to achieving Congress' objective.

Apart from the claim that H.R. 1755 would violate the right to travel refuted above, it still could be claimed that H.R. 1755 is inconsistent with federalism. The claim is that federalism allows diversity across states, but also requires that citizens be able to travel to other states so as to be subject to that other state's laws on an issue-by-issue basis. While such a claim is not illogical, it reflects, in my view, a less compelling conception of federalism than the diversity-supporting system that a law such as H.R. 1755 promotes.[47] In any event, my point here is not to vindicate my particular view of federalism, but to show that the argument that H.R. 1755 is flatly antithetical to federalism is groundless. Rather, the proposed legislation's relationship to federalism is a function of what conception of federalism one holds. The Supreme Court has not answered this question. It is my view that answering this question is Congress' prerogative, subject to only a highly deferential Supreme Court review.

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[44]See id. at 489-502. This so-called "second component" of the right to travel would not be implicated by H.R. 1755. This second component limits the state that a citizen visits, but not her home state. It is an equal protection type principle that limits the extent to which the visiting state can treat visitors differently from its own citizens, but it in no way affects the home state's power to regulate its own citizens when they go out-of-state. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75-77 (1873) (the Privileges and Immunities Clause of Article IV "does not profess to control the power of the State governments over the rights of its own citizens."); see generally Rosen, supra note 31, at 900-903. The third aspect of the right to travel – "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State," Saenz, 119 S.Ct. at 1526 – plainly is not implicated by H.R. 1755.

[45]Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 298 (1998) (internal quotations omitted).

[46]See Saenz, 526 U.S. at 500.

[47]"Pick and choose" federalism undermines diversity across states by systematically disfavoring those state laws that are more regulatory of their citizens than are other states' laws. "Less regulatory" should not be confused with liberty-enhancing. Those jurisdictions that wish to regulate more than their neighbor states do so because they have differing notions of the public good. Indeed, undermining laws that protect the rights of third-parties – as parental notification laws are designed to do – undercut those third parties' liberty interests. A fair way to decide between these competing conceptions of federalism, it seems to me, is to perform a thought experiment of the sort famously proposed by John Rawls. If one were behind a "veil of ignorance" and did not know whether she represented a libertarian (who chafed at regulation) or a regulationist who thought that regulation frequently was good, what type of federalist system would she opt for? It seems obvious to me that the favored federalist system would be one that permitted meaningful diversity across states with regard to those matters that federal constitutional and statutory law did not demand national uniformity. For a more elaborate discussion of this, see Rosen, supra note 31, at 882-91.

C. *Abortion Rights*

Finally, some have argued that H.R. 1755 is inconsistent with the limitations on abortion that the Court has located in the Fourteenth and Fifth Amendments. The Supreme Court has held that laws regulating abortion must provide an exception for the "preservation of the *life or health* of the mother."[48] H.R. 1755 provides an exception, however, only "if the abortion was necessary to save the life of the minor."[49] The bill's absence of an exception for the mother's health nonetheless does not violate the Court's requirement because H.R. 1755 piggybacks on state parental notification statutes. Assume for present purposes that state parental notification statutes must provide an exception for the health of the mother to be constitutional. If the mother's health is endangered, state law cannot require parental notification, and transportation of a minor across state lines[50] consequently would not run afoul of H.R. 1755's prohibition. On the other hand, if a state parental notification statute did not include an exception for the health of the mother, then it would be constitutionally invalid and for that reason could not provide the predicate for liability under H.R. 1755. In short, because the state law that H.R. 1755 operates in conjunction with state law that already must contain a health exception to be valid, H.R. 1755 itself need not contain such an exception. The absence of a health exception in H.R. 1755 does not render it inconsistent with the case law that defines rights in relation to abortion because H.R. 1755 in effect incorporates state parental notification laws, which must have an exception for the health of the mother in order to trigger H.R. 1755's application.

IV. CONCLUSIONS

For the reasons discussed above, I am of the view that Congress has power under the Full Faith and Credit Clause and under the Commerce Clause to enact H.R. 1755. The bill is not flatly contrary to principles of federalism, but rather is fully consistent with a plausible conception of federalism. H.R. 1755 does not run afoul of any constitutional limitations on state extraterritorial powers, nor is it inconsistent with the right to travel or with the abortion rights that the Court has located in the Fourteenth and Fifth Amendments.

In short, whether H.R. 1755 should be enacted is a purely political question that is not foreclosed to the Congress by the Constitution.

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[48]Stenberg v. Carhart, 120 S. Ct. 2597, 2613 (2000) (emphasis supplied).

[49]See Sec. 2431(b)(1).

[50]Such transportation would not, of course be necessary, since an abortion without parental notification would be permissible in the minor's home state under such circumstances.